IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

WILLIAM J. FERNEDING, JR.,	:	APPEAL NO. C-081074 TRIAL NO. A-0803732
and	:	*JUDGMENT ENTRY.*
STEVEN R. FERNEDING,	:	
Plaintiffs-Appellees,	:	
vs.	:	
SUE ANN BARLAGE,	:	
PRODUCT FABRICATING, INC.,	:	
and	:	
ESTATE OF MARK BARLAGE, SUE ANN BARLAGE, EXECUTRIX,	:	
Defendants-Appellants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Defendant-appellant Sue Ann Barlage and her ex-husband, Mark Barlage, jointly owned Product Fabricating Co. and the real property it occupied. The Barlages sold the property to plaintiffs-appellees William J. Ferneding, Jr., and Steven R. Ferneding by deed executed on January 9, 2007. The closing took place on February 9, 2007. The deed was recorded on February 14, 2007. The contract to purchase the real property contained a provision that stated, "Mark Edward Barlage shall have the right of first refusal to buy back the subject property within (11) eleven

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

months from the date of the closing and execution of the deed." For purposes of summary judgment the parties treated the contract right as an option to buy back the property and not as a right of first refusal. The option was to expire on January 9, 2008. Mark Barlage, who was operating Product Fabricating Co. on the property, also received "up to 11 months rent free." Mark Barlage died on December 31, 2007. Sue Ann Barlage was subsequently appointed executrix of Mark Barlage's estate.

On January 3, 2008, Sue Ann Barlage informed Steven Ferneding that she wanted to exercise the option to buy back the property. Steven Ferneding told Sue Ann Barlage that he would have to talk to his brother, William. Sue Ann Barlage attempted but was unable to further contact the Fernedings. A scheduled meeting was cancelled. On January 28, 2008, the Fernedings told Sue Ann Barlage that they would not sell the property to her. On March 17, 2008, the Fernedings filed a complaint for forcible entry and detainer against Sue Ann Barlage and the other defendants. The defendants filed counterclaims and requested a declaration that they be allowed to purchase the property. After the case was transferred to the common pleas court, the Fernedings filed a motion for summary judgment, which the trial court granted. The court also dismissed the counterclaims. The trial court found that Sue Ann Barlage had not properly exercised the option to purchase. The court determined that Sue Ann Barlage's notice to Steven Ferneding that she wanted to exercise the option was insufficient because she had failed to show that she was "ready, willing, and able" to purchase the property.

The sole assignment of error alleges that the trial court erred in granting the Fernedings' motion for summary judgment.

The trial court may grant a motion for summary judgment only when the evidence shows that no genuine issue of material fact remains to be litigated, the moving party is entitled to judgment as a matter of law, and it appears, with the

evidence construed most strongly in favor of the nonmoving party, that reasonable minds can come to but one conclusion, and that conclusion is adverse to that party.[2]

The moving party bears the initial burden of demonstrating that no genuine issues of material fact exist.[3] Once the moving party has satisfied its burden, the nonmoving party has a reciprocal burden to set forth specific facts showing that there is a genuine issue for trial.[4] Any doubt must be resolved in favor of the nonmoving party.[5]

In *In Re Estate of De Saint-Rat*,[6] the Twelfth Appellate District held that a facsimile letter sent on May 31, 2006, was enough to exercise an option to purchase real property before the deadline of June 1, 2006, even though the purchase price was not tendered, because the option contract had not made payment of the price a condition precedent to the exercise of the option, the contract had not made time of the essence, and the contract had not specified a method of exercising the option, the terms of payment, or the closing date. Tendering payment within a reasonable time was sufficient.

The option contract in this case did not specify the method for exercising the option, the method of payment, or the time and place of closing. The contract did not state that time was of the essence. Sue Ann Barlage did all she had to do when on January 3, 2008, she informed Steven Ferneding within the allotted time that she wanted to exercise the option to purchase the property. She then had a reasonable time to perform. The Fernedings told Sue Ann Barlage on January 28, 2008, that they would not sell her the property, making any attempt on her part to tender the purchase price futile. Further, the Fernedings had avoided Sue Ann Barlage after Steven Ferneding had initially told her that they would get back to her. The

[2] See Civ.R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 364 N.E.2d 267.
[3] See *Dresher v. Burt*, 75 Ohio St.3d 280, 1996-Ohio-107, 662 N.E.2d 264.
[4] See id.
[5] See *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 1992-Ohio-95, 604 N.E.2d 138.
[6] 12th Dist. No. CA2007-02-052, 2008-Ohio-2109.

Fernedings had made it difficult, if not impossible, for Sue Ann Barlage to tender performance.

Construing the evidence most strongly in favor of Sue Ann Barlage, we hold that there are genuine issues of material fact as to whether Sue Ann Barlage properly exercised the option to purchase the property. The trial court erred in granting summary judgment. The assignment of error is sustained.

Therefore, we reverse the trial court's judgment and remand the cause for further proceedings consistent with law and this Judgment Entry.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HIILDEBRANDT, P.J., CUNNINGHAM and **WINKLER, JJ.**

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on September 16, 2009

per order of the Court _____.

Presiding Judge